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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,

Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLANTS' BRIEF

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QUESTIONS PRESENTED

Whether the district court erroneously held that state reapportionment officials must, as a prerequisite to redistricting, conduct a totality of circumstances analysis adopted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Whether the district court erroneously shifted the burden of proof from plaintiffs attacking legislative districts as diluting minority voting strength to defendant reapportionment officials by requiring them to prove a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, prior to the creation of any minority controlled state legislative districts.

Whether the district court's finding of a violation of § 2 of the Voting Rights Act is erroneous.

Whether the district court erroneously enjoined the primary election for members of the Ohio General Assembly and appointed a special master to redraw Ohio's state legislative districts without first affording defendants a reasonable opportunity to adopt substitute districts.

Whether the district court's finding of a violation of the Fifteenth Amendment is erroneous.

Whether the district court's finding of a violation of the Fourteenth Amendment is erroneous.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Chio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District, MARY ABEL, Representative of the 94th Ohio House District, and WILLIAM MALLORY, Representative of the 23rd Ohio House District.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LISTING OF ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	20
ARGUMENT	22
I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS	22
II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MINORITY CONTROLLED DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT	29
A. Size and Compactness of African-American Populations	32
B. Cohesiveness of African-Americans and Racial Bloc Voting	33
C. History of Official Discrimination	35
D. Barriers to Effective Minority Participation	35
E. Other Factors	36

TABLE OF CONTENTS—Continued

Page

III. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN ... 37

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT ... 39

V. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT ... 43

CONCLUSION ... 47

TABLE OF AUTHORITIES

Cases	Page
Abate v. Mundt, 403 U.S. 182 (1971)	44
Armour v. Ohio, 755 F.Supp. 1044 (N.D. Ohio 1991)	6, 11, 35
Brown v. Thomson, 462 U.S. 835 (1983)	45
Burns v. Richardson, 384 U.S. 73 (1966)	38
City of Mobile v. Bolden, 446 U.S. 55 (1980)	39, 42
Clark v. Edwards, 725 F.Supp. 285 (M.D.La. 1988), *reaffirmed*, 777 F.Supp. 471 (1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992)	33
Collins v. City of Norfolk, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 111 S.Ct. 340 (1990)	33
Cotlow v. Growe, No. C8-91-985 (Minn. Redistricting Panel Nov. 21, 1991)	29
Davis v. Mann, 377 U.S. 678 (1964)	44
DeBaca v. County of San Diego, —— F.Supp. ——, 1992 WL 114049 (S.D.Cal. May 11, 1992)	33
DeGrandy v. Wetherell, —— F.Supp. ——, 1992 WL 145189 (N.D.Fla. May 29, 1992)	22, 26, 28
Flanagan v. Gillmor, 561 F.Supp. 36 (S.D.Ohio 1982), *aff'd*, 467 U.S. 1223 (1984)	39, 42
Fonfara v. Reapportionment Comm'n, 222 Conn. 166 (1992)	22, 30
Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991)	27, 40
Hall v. Holder, 955 F.2d 1563 (11th Cir. 1992), *petition for cert. filed*, 60 USLW 3881 (June 16, 1992)	32
Harvell v. Ladd, 958 F.2d 226 (8th Cir. 1992)	33
Hastert v. State Bd. of Elections, 777 F.Supp. 634 (N.D.Ill. 1991)	28
In re Pennsylvania Legislative Reapportionment Comm'n, —— A.2d ——, 1992 WL 100392 (Pa. Feb. 14, 1992), *cert. denied*, 112 S.Ct. 2998 (1992)	29
In re Petition of Stephan, —— P.2d ——, 1992 WL 165961 (Kan. July 10, 1992)	28
In re Reapportionment of the Colorado Gen. Assembly, 828 P.2d 185 (Colo. 1992)	30

TABLE OF AUTHORITIES—Continued

Page

Jeffers v. Clinton, 730 F.Supp. 196 (E.D.Ark. 1989), *aff'd*, 111 S.Ct. 662 (1991) 28
Jordan v. Winter, 604 F.Supp. 807 (N.D.Miss. 1984) (*per curiam*), *aff'd*, 469 U.S. 1002 (1984) 35
Kansas ex rel. Stephan v. Graves, —— F.Supp. ——, 1992 WL 152251 (D.Kan. June 24, 1992) 30
Karcher v. Daggett, 462 U.S. 725 (1983) 30
Mahan v. Howell, 410 U.S. 315 (1973) 45
Major v. Treen, 574 F.Supp. 325 (E.D.La. 1983) 37
Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991) 8, 35
Prosser v. Election Bd., —— F.Supp. ——, 1992 WL 124378 (W.D.Wisc. June 2, 1992) 28, 37
Reynolds v. Sims, 377 U.S. 533 (1964) 23, 44
Roman v. Sincock, 377 U.S. 695 (1964) 44
Terrazas v. Slagle, 789 F.Supp. 828 (W.D.Tex. 1991), *aff'd*, 112 S.Ct. 3019 (1992) 28
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) 27, 28
Voinovich v. Ferguson, 63 Ohio St. 3d 198 (1992) 10, 12, 17, 41, 43, 46
Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109 (5th Cir. 1991) 32
White v. Regester, 412 U.S. 755 (1973) 40
White v. Weiser, 412 U.S. 783 (1973) 23
Wilson v. Eu, 1 Cal.4th 707, 4 Cal.Rptr.2d 379 (1992) 27
Wise v. Lipscomb, 437 U.S. 535 (1978) 38

United States Constitution

Fourteenth Amendment 19, 21, 43, 44, 46
Fifteenth Amendment 18, 21, 39, 40, 41, 42

Statutes

28 U.S.C. § 1253 2
28 U.S.C. § 1441(b) 11
28 U.S.C. § 1443 11

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1973	*passim*
42 U.S.C. § 1973c	24, 27
Miscellaneous	
Ohio Const., Art. XI, § 1	3, 14
Ohio Const., Art. XI, § 2	9
Ohio Const., Art. XI, § 3	10, 45
Ohio Const., Art. XI, § 4	45
Ohio Const., Art. XI, § 7(D)	10
Ohio Const., Art. XI, § 9	10, 43, 46
Ohio Const., Art. XI, § 10	9
Ohio Const., Art. XI, § 10(A)	9
Ohio Const., Art. XI, § 10(B)	10, 43, 46
Ohio Const., Art. XI, § 10(C)	10
Ohio Const., Art. XI, § 10(D)	12
Ohio Const., Art. XI, § 11	9
F.R.Civ.P. 12(a)	15
Ohio Admin. Code § 011-1-09	4
S.Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Admin. News 177	22, 31

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Appellees.

Appeal from the United States District Court for the Northern District of Ohio

APPELLANTS' BRIEF

OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has been officially reported at —— F. Supp. ——, 1992 WL 114748. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set out in the *Appendix to Jurisdictional Statement* at App. 1a-46a.[1]

[1] The following citation abbreviations are used in this brief:

App. *Appendix to Jurisdictional Statement*
J.A. *Joint Appendix*
D. Docket Number
Ex. Exhibit Number

For the convenience of the Court, a table of the docket and exhibit numbers cited herein is attached as an appendix to this brief.

"Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is set out at App. 47a-117a.

The February 18, 1992 Findings and Conclusions of the Ohio Apportionment Board, on remand following the January 31, 1992 Opinion and Order of the three-judge court, were filed with the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and are set out at App. 160a-273a.

The March 10, 1992 Order of the three-judge court has been officially reported at —— F.Supp. ——, 1992 WL 114880. It is set out at App. 118a-126a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not yet been officially reported. It is set out at App. 127a-148a.

The March 31, 1992 Order of the three-judge district court has been officially reported at —— F.Supp. ——, 1992 WL 122792. It is set out at App. 324a.

The May 5, 1992 Order of the three-judge district court has been officially reported at —— F.Supp. ——, 1992 WL 114881. It is set out at J.A. 333-50.

JURISDICTION

The Orders appealed from were filed on March 10, 1992, March 19, 1992, and March 31, 1992. Notices of Appeal from these Orders were filed on March 11, 1992, March 25, 1992, and April 1, 1992, respectively. App. 149a, 156a, 325a. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The text of the Fourteenth and Fifteenth Amendments to the United States Constitution, 28 U.S.C. §§ 1253 and 2284, 42 U.S.C. §§ 1973 and 1973c, and Article XI of the Ohio Constitution is set out at App. 274a-286a.

STATEMENT OF THE CASE

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board[2] convenes every ten years in the year following the decennial census. App. 279a. The 1991 Apportionment Board, consisting of Defendants-Appellants (Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and Ohio Senate President Stanley J. Aronoff) and two of the Plaintiffs-Appellees (Auditor of State Thomas E. Ferguson and Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter) convened on August 22, 1992. App. 160a, 163a.

At the initial meeting, the Board elected Governor Voinovich as its Chairman, D. 123 at 8, and appointed Defendant-Appellant James R. Tilling, Chief Executive Officer of the Ohio Senate, as its Secretary. App. 161a. In addition, the Board, for the first time in Ohio history, determined that the apportionment process should be open for public input to the extent reasonably possible given constitutional time constraints.[3] Accordingly, the Board agreed to hold a series of public hearings throughout the state for the purpose of receiving suggestions, comments, testimony, and other evidence from members of the general public concerning the reapportionment of the Ohio General Assembly. J.A. 272. The Board also directed that a computer terminal, as well as its census data base and reapportionment software, be made available to the public so that those who wished to submit

[2] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of State, Auditor of State, and two persons chosen by the legislative leaders "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Cont., Art. XI, § 1; App. 279a. For ease of reference, these apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

[3] Under Article XI, § 1 of the Ohio Constitution, the Apportionment Board can convene no earlier than August 1, and must publish a plan no later than October 5. App. 279a.

plans for the Board's consideration would have the opportunity to do so. J.A. 275.[4] The Board adopted rules providing that anyone desiring to submit a plan for the Board's consideration should do so by 4:00 p.m. on September 26, 1991. Ohio Adm. Code § 011-1-09.

Following the initial meeting, Appellants Voinovich, Taft, and Aronoff directed Appellant Tilling to draft and submit a plan on behalf of the majority members of the Apportionment Board. J.A. 272; D. 75 at 11; D. 102 at 11; D. 123 at 7-8. Tilling was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* J.A. 272; D. 75 at 13; D. 123 at 9. The majority members of the Board stressed to Tilling that the preservation of county and political subdivision boundaries was an important goal in drafting the plan. J.A. at 272-74. The majority members did not continually monitor Tilling during the drafting of the plan, but rather entrusted him to follow their instructions. J.A. 234; D. 75 at 16, 18-19; D. 102 at 73-74; D. 110 at 15-16.

Tilling did not immediately begin drafting a plan on behalf of the majority members of the Board. Rather, he attended all of the public hearings throughout the state. D. 154, Exs. 1-14; D. 102 at 63-64, 69. At most of these hearings, the Apportionment Board heard testimony from members of the minority community imploring the Board to enhance minority voting strength by creating more minority controlled districts, *i.e.*, districts in which a minority group constituted a majority of the population.[5]

[4] The computer software, *i.e.*, the "unified data base" which aligned census data with political subdivision boundaries, did not become available until late August or early September, 1991. D. 123 at 166-67.

[5] For example, Dana Mattison, Executive Director of the Black Elected Democrats of Ohio ("BEDO"), testified at several of the public hearings and called for the "enhancement" of minority voting strength. D. 154, Ex. 1 at 34-37; Ex. 2 at 30-31; Ex. 3 at 29-30; Ex.

The district court in this case referred to such districts as "majority-minority districts." *Quilter v. Voinovich*, App. at 2a (N.D.Ohio Jan. 31, 1992).

It was at these hearings that Tilling, who is not a lawyer, made certain statements about the Voting Rights Act to members of the general public. Appellees, as well as the district court, have mischaracterized Tilling's approach as blindly requiring the creation of minority controlled districts "wherever possible." See, e.g., *Quilter v. Voinovich*, App. at 9a (N.D.Ohio Jan. 31, 1992). In fact, Tilling's statements, all given prior to the drafting of the plan, have been taken out of context and do not accurately reflect either Tilling's view of the Voting Rights Act or the process he used in drafting the 1991 plan of apportionment. A full review of the public hearing transcripts reveals that reference to these isolated comments does not accurately convey the substance of Tilling's explanation of the significance of the Voting Rights Act. For example, in the September 7, 1991 Columbus public hearing, Tilling stated:

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5 at 39-40; Ex. 14 at 29-30. Numerous other representatives of the minority community made such requests at the hearings throughout the state: Floyd Johnson, coordinator of the reapportionment project for the National Association for the Advancement of Colored People, Ohio Conference of Branches ("Ohio NAACP"), at the Dayton and Columbus hearings, D. 154, Ex. 5 at 64-65; Ex. 13 at 99-100; Bishop Henry H. Brownlee at the Toledo hearing, D. 154, Ex. 1 at 72-73; Fred Parker, Vice President of the Columbus NAACP at the Columbus hearings, D. 154, Ex. 2 at 25-26; Ex. 13 at 19-20; William Nelson, Ph.D., Professor of Political Science and Black Studies at the Ohio State University, at the first Columbus hearing, D. 154, Ex. 2 at 41-42; Warrensville Heights Councilman James Mitchell, representing the Black Elected Suburban Officials, at the Cleveland hearing, D. 154, Ex. 3 at 25; Frank Allison, President of the Cincinnati NAACP, at the second Columbus hearing, D. 154, Ex. 13 at 42-48; Samuel Gresham, Jr., President and Chief Executive Officer of the Columbus Urban League, at the second Columbus hearing, D. 154, Ex. 13 at 56; Mark Bradley, of the People's Coalition for Voter Participation, at the second Columbus hearing, D. 154, Ex. 13 at 62-64; and Cathy Mock, President of the Young Black Democrats, at the second Columbus hearing, D. 154, Ex. 13 at 110.

> I appreciate it and I'd like the record to show that is our interpretation as well and it's one of the most important reasons we are soliciting input to the black community around Ohio . . . . *We need to establish for the record the totality of the circumstances in each urban area in order for us to do our job correctly*, so we need your help and we need the help of the other minority communities around the state, but that is our interpretation of the Armor [*sic*] case [*Armour v. Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991)] and Voting Rights Act as well, so I appreciate very much your comments.

D. 154, Ex. 13 at 33 (emphasis added).[6]

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[6] Similarly, Tilling explained his view of the Voting Rights Act during his November 20, 1991 deposition:

> A. * * * I think the first thing as a result of all the discussion and all the readings that I had done, I think uppermost in my mind was the notion that if you look at the entire totality of the circumstances, the principle that we should seek to achieve is no dilution of minority voting rights.
>
> * * *
>
> Q. Do you have the statement, "Courts have said wherever you can create a majority/minority district you must do so. It's just that simple"?
>
> A. Yes.
>
> Q. Was that your statement?
>
> A. I believe that is a statement that follows in my opening remarks where I said that the first guideline the Apportionment Board is operating under is that minority representation cannot be diluted. * * * [M]inority representation cannot be diluted in the process of drawing lines. And then I go on to say that, you know, where majority/minority districting could be created they should do so.
>
> * * *
>
> Q. Was that a true and accurate statement at the time you made it?
>
> A. Well, I would say for purposes of introducing the subject to people that we're [sic] not experts. It's a simplified statement of reality, but we only had an hour and a half or two hours for the meeting and so the purpose of the meeting was to try to get input from the community and I was trying to be

In addition to receiving public testimony regarding the creation of minority controlled districts, Tilling drew upon his extensive past personal experience in Ohio politics as Chief Executive Officer of the Ohio Senate and chief Republican campaign strategist for Ohio Senate campaigns, and upon his expertise as a political science professor at Ohio University in Athens, Ohio, to conclude that this Court's framework in *Thornburg v. Gingles*, 478 U.S. 30 (1986), supported the creation of minority controlled districts in Ohio's urban counties. D. 102 at 4-7, 162-63, 168-69; D. 123 at 64-65. Tilling did not believe that a formal analysis, including a detailed statistical ecological regression analysis, was required prior to his drafting of the plan, D. 104 at 28-29, and therefore devoted his scarce time to other tasks involved in preparing his proposed plan. D. 102 at 33, 38; D. 123 at 184-85.[7]

When Tilling began drafting the plan, he consulted with the National Association for the Advancement of Colored People, Ohio Conference of Branches ("Ohio NAACP") to help ensure the protection of minority

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> as brief and concise as possible and basically give them an overview of the process and then listen to the minority and other interested parties' input. W..s similar to a statement that does appear in the NAACP handbook, "Minority Guide to Voting."

D. 102 at 24-27. In response to a further question about applicable standards, Tilling continued his explanation:

> A. Well, as I said, the simplest description of it is in the "Minority Guide to Redistricting" by the NAACP, that *in the state where you have examples of racial block* [sic] *voting and you have a minority group that is sufficiently compact that a majority/minority district can be drawn for them*, that in fact should be done.

D. 101 at 29 (emphasis added). See also D. 102 at 162.

[7] The computer system and software purchased for reapportionment had not become operational until late August or early September, 1991, and the plans were due no later than 4:00 p.m. on September 26, 1991. D. 123 at 166-67.

interests in the reapportionment process. D. 73 at 44; D. 102 at 119-22; D. 123 at 50, 173-85. Contrary to the district court's characterization of Tilling as blindly creating minority controlled districts "wherever possible," Tilling clearly explained, in his deposition of November 20, 1991, that he created such districts only after he concluded that they were warranted by the "totality of circumstances." D. 102 at 44-47.

Tilling concluded that minority populations in Ohio were sufficiently large and geographically compact to constitute a majority in approximately nine Ohio House districts, D. 123 at 63-76, that these minorities (African-Americans) were politically cohesive, D. 123 at 66-73, and that racial bloc voting existed throughout Ohio. D. 102 at 30, 162-63; D. 123 at 64-76, 93.[8] Tilling also noted that minorities in Ohio suffered from the effects of past discrimination, D. 123 at 93-99, 124,[9] that the political

[8] In reaching the conclusion that racial bloc voting existed throughout Ohio, Tilling took into account his personal knowledge of numerous campaigns which pitted white against black candidates, including the 1988 Democratic Presidential primary involving Jesse Jackson, Cleveland and Columbus mayoral races, a Cuyahoga County Clerk of Courts race, a Columbus City Attorney race, state legislative races going back to 1982, and several statewide races. D. 102 at 30-32, 35, 171-73; D. 123 at 91. Tilling was also aware of the lawsuit commenced by William Mallory, who is a Plaintiff-Appellee in this case, challenging Hamilton County municipal court elections as diluting minority voting strength in violation of the Voting Rights Act, see *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991). D. 102 at 36; D. 123 at 70-71, as well as the testimony at the public hearings reflecting racial bloc voting in numerous elections throughout the state. D. 102 at 30-31. He looked at these materials "to satisfy ourselves that there was a preference of black voters for black candidates where that choice is available, but most importantly that the white majority or component of that district that was made up of white voters did not support the black candidate in anywhere near those numbers, effectively to show there was polarized racial block [sic] voting." J.A. 11.

[9] Tilling was aware that the school systems in Cleveland, Columbus, Cincinnati, and Dayton were under court desegregation

party nominating process had not been equally open to black candidates, D. 102 at 166-68, 171-72; D. 123 at 97-98, and that past campaigns had been characterized by racial appeals. D. 102 at 194-97. Tilling was, of course, aware that African-Americans were incumbents in several districts in Ohio which did not have a majority of African-American voting age population, J.A. 11, but rejected the notion that the reapportionment be based upon the incumbencies of African-American legislators. D. 102 at 47-48; D. 123 at 90, 176-78.

As noted above, Tilling did not begin to draft his proposed plan until mid-September 1991, following the series of public hearings. D. 102 at 63-64. Using the framework provided in Article XI, § 10 of the Ohio Constitution, Tilling began by designating the four counties having a population between 95% and 105% of one house "ratio of representation" [10] as single county house districts. See Ohio Const., Art. XI, § 10(A); App. 283a; D. 102 at 42-43; D. 123 at 58. Consistent with the Ohio Constitution's express policy, as well as the Apportionment Board majority's express instructions to him to preserve county boundaries where reasonably possible, Tilling then designated the three counties having a population between 90% and 95% or between 105% and

orders, that African-Americans had a higher rate of unemployment than caucasians, had lower education levels, lived disproportionately in substandard housing, and had lower voter turnout. D. 123 at 96-99, 124.

[10] Article XI, § 2 of the Ohio Constitution provides that "[t]he whole population of the state, as determined by the federal decennial census . . . , shall be divided by the number 'ninety-nine' and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment." App. 280a. That section similarly provides that "[t]he whole population of the state . . . shall be divided by the number 'thirty-three' and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment." App. 280a. Senate districts are constructed by combining three whole house districts. Ohio Const., Art. XI, § 11; App. 284a.

110% of one house ratio as single county house districts. See Ohio Const., Art. XI, §§ 9, 10(B); App. 283a; D. 102 at 43; D. 123 at 58.

Proceedings to § 10(C), Tilling next began drawing boundaries for house districts within those counties entitled to more than one house district, proceeding from the largest county to the smallest.[11] D. 102 at 43-44; D. 123 at 60-61. This progression resulted in the creation of House Districts 8 through 80, and included the creation of all house districts within Ohio's eight urban counties, *i.e.*, Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Montgomery (Dayton), Summit (Akron),

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[11] It is undisputed that the majority of these districts had to be reconfigured because they did not meet the population requirements of Article XI, § 3 of the Ohio Constitution. *Quilter v. Voinovich*, App. at 59a-60a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 172a-174a (Ohio Apportionment Board Feb. 18, 1992). The boundaries of those districts which did meet the population requirements could not be retained because the boundaries of most of the districts surrounding them had to be reconfigured to either add or subtract population. *Quilter v. Voinovich*, App. at 61a-62a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 175a-176a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 81. In general, Ohio experienced a population shift from the northeastern quadrant of the state to the central and southwestern portions of the state, with Cuyahoga County losing one full house district and Franklin County gaining one full house district. *Quilter v. Voinovich*, App. at 58a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 172a (Ohio Apportionment Board Feb. 18, 1992); D. 102 at 110-13; D. 123 at 61-63.

Appellees alleged that Appellants' failure to retain the few districts which did meet the population requirements violated Article XI, § 7(D)'s requirement that prior district boundaries be retained to the extent reasonably possible. D. 47 at 11-13. Appellees raised, but abandoned, this issue before the Ohio Supreme Court, see *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 206 (1992) (Douglas, J., concurring), and the district court in this case abstained on all questions of state law. *Quilter v. Voinovich*, App. at 15a (N.D.Ohio Jan. 31, 1992). Consequently, neither that issue nor any other issue of state law is presently before this Court.

Lucas (Toledo), Stark (Canton), and Mahoning (Youngstown),[12] and the minority controlled districts at issue in this case. See App. 90a.[13] Tilling completed his

[12] The districts in Mahoning County were drawn pursuant to the federal district court's order in *Armour v. Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991), in which the court concluded that the 1981 Apportionment Board had discriminated against African-Americans, both under the results test of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and intentionally in violation of the Fifteenth Amendment, by splitting the African-American population in Mahoning County between two house districts. The majority of the *Armour* court consisted of Judges Jones and Peck, who also comprise the majority of the district court in the case at bar. The State did not appeal from this ruling and, accordingly, the 1991 Apportionment Board configured the house districts in Mahoning County in conformity with the district court's ruling. D. 123 at 77-78. The districts in Mahoning County have not been challenged in this case.

[13] During Tilling's drafting of these districts, it became apparent that there was a conflict under the Ohio Constitution with respect to the drawing of district lines in northeastern Ohio. D. 123 at 146-51. Consequently, on September 19, 1991, Voinovich, Taft, and Aronoff commenced a declaratory judgment action in the Ohio Supreme Court against Ferguson and Quilter (Appellees here) and others. On September 24, 1991, defendants Ferguson and Quilter removed the action to the United States District Court for the Southern District of Ohio. In their removal petition, Ferguson and Quilter suggested that removal was based upon 28 U.S.C. § 1441(b) and § 1443. Plaintiffs moved to remand the case to the Ohio Supreme Court, arguing that removal was improper under both of these sections.

On October 28, 1991, District Judge Graham remanded the case to the Ohio Supreme Court. On October 30, 1991, Defendants Ferguson and Quilter filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit and simultaneously filed a motion to stay the remand order, which Judge Graham denied on November 1, 1991.

Thereafter, the Ohio Supreme Court recommenced proceedings upon remand, and on November 20, 1991, issued a scheduling order for the submission of evidence and the filing of briefs. *Voinovich v. Ferguson*, 62 Ohio St. 3d 1209 (1991). On November 21, 1991, three weeks after Judge Graham had denied their motion for a stay and after the Ohio Supreme Court had recommenced proceedings

draft of the plan by combining the remaining areas of the state into the remaining nineteen house districts. Ohio Const., Art. XI, § 10(D); App. 284a; D. 102 at 44.

Pursuant to the Board's rules, Tilling submitted his plan to the Board on September 26, 1991. Three other plans were submitted for the Board's consideration prior to the deadline on that date: one drafted by Robert R. Dykes ("Dykes") on behalf of the Democrat members of

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on remand, Ferguson and Quilter filed an "emergency" motion with the Sixth Circuit requesting a stay of the Ohio Supreme Court proceedings. At 8:42 p.m. on November 25, 1991, a panel of the Sixth Circuit, by a two-to-one vote, issued an order which had the effect of staying the proceedings of the Ohio Supreme Court. The two judges in the majority on the stay motion were Judges Jones and Peck, two of the three judges sitting on the three-judge court in the instant case. Judges Jones and Peck suggested that the *Voinovich* plaintiffs, who are Defendants-Appellants in this case, filed the *Voinovich* action *on September 19, 1991*, "to interfere with and to divert the jurisdiction of the federal court to proceed to judgment in" *this* case, even though *this* case *was not filed until November 1, 1991*. *Voinovich v. Ferguson*, No. 91-4057, slip op. at 3 (6th Cir. Nov. 26, 1991). Circuit Judge David A. Nelson dissented.

On December 12, 1991, the Sixth Circuit *sua sponte* issued an *en banc* order granting rehearing and vacating the stay order. *Voinovich v. Ferguson*, No. 91-4057 (6th Cir. Dec. 12 & 13, 1991) (*en banc*). In an opinion filed on December 23, 1991, Judge Jones, joined by Judge Peck, dissented from the granting of the rehearing *en banc*. *Voinovich v. Ferguson*, No. 91-4057 (6th Cir. December 23, 1991) (Jones, J., dissenting). Ferguson and Quilter dismissed their appeal following the granting of rehearing.

The Ohio Supreme Court once again commenced proceedings in the *Voinovich* case, and on January 13, 1992, denied motions to dismiss. *Voinovich v. Ferguson*, 62 Ohio St.3d 1224 (1992). On February 14, 1992, the Ohio Supreme Court issued a decision in which it concluded that the plan of apportionment was constitutional under the Ohio Constitution, specifically with reference to those districts which the district court in this case, in its March 19, 1992 opinion, App. at 127a, declared to be in violation of the Fourteenth Amendment. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992).

the Apportionment Board,[14] one by the Black Elected Democrats of Ohio ("BEDO"), whose plan mirrored that submitted by the Democrat members, *Findings and Conclusion*, App. at 164a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 36, and one by the Ohio Republican Party. *Quilter v. Voinovich*, App. at 50a (N.D.Ohio Jan. 31, 1992) (Dowd, J., dissenting); *Findings and Conclusion*, App. at 163a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 34. In addition, two partial plans were submitted: one by the Ohio NAACP for all urban areas of the state, and one by Mike Jones for minority controlled districts in Franklin County. D. 123 at 34-35.[15] The partial plan submitted by the Ohio NAACP was nearly identical to the districts in the urban areas under the plan submitted by Tilling pursuant to the instructions of the majority members of the Apportionment Board. D. 103 at 22-23.

The Board reconvened on September 30, 1991, to consider the various plans and to receive any amendments. D. 154, Ex. 15 at 5-8. After hearing testimony on all of the plans, the Board recessed until the following day. D. 154, Ex. 15 at 132. On October 1, 1991, after several hours of consultations which included Tilling, the Ohio NAACP, BEDO, the Black Elected Democrats of Cleveland, Ohio ("BEDCO"), Senator Jeff Johnson, an African-American member of the General Assembly, and Representative Louis Stokes, an African-American member of the United States Congress from Cleveland, D. 154, Ex. 16 at 2-12; D. 123 at 39-40, a consensus was reached and the Tilling plan was amended to include the

[14] Dykes was the drafter of the 1981 plan of apportionment which the *Armour* court concluded discriminated against minorities. 775 F.Supp. at 1060-61. See also D. 154, Ex. 15 at 75-77.

[15] Jones testified at the Apportionment Board's hearing on September 30, 1992, that he represented the South Side Community Action Association and that the plan submitted by Tilling on behalf of the majority members of the Board satisfied that group's concerns. D. 154, Ex. 15 at 85-86.

districts in Cuyahoga County endorsed by the minority community. D. 154, Ex. 16 at 29-30.[16] The Apportionment Board then proceeded to adopt the Tilling plan, as amended. D. 154, Ex. 16 at 31-32.

The Board reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. "Amendment C" was published throughout the state beginning on October 5, 1991, as required under the Ohio Constitution. See Ohio Const., Art. XI, § 1; App. 279a-280a.

On November 1, 1991, Plaintiffs-Appellees[17] commenced this action in the United States District Court for the Northern District of Ohio, alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1; J.A. 1. Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit appointed Circuit Judge Nathaniel R. Jones and Senior Circuit Judge John W. Peck to the three-judge panel designated to hear the case. D. 7; J.A. 1. United States District Judge David D. Dowd, Jr. was the third member of the three-judge court.

On November 14, 1991, the District Court advised counsel that this case would be tried on December 3,

[16] The amendment reduced the number of minority controlled districts in Cuyahoga County from five to four. D. 154, Ex. 16 at 16-17, 22.

[17] As noted above, Appellees include Apportionment Board members Ferguson and Quilter. Appellees Richard Cordray, Paul Mechling, Ronald Gerberry, Mary Abel, and William Mallory, like Quilter, are incumbent Democratic Members of the Ohio House of Representatives. D. 47 at 5, 8; D. 16 at 2-3. The remaining Appellees are largely Democratic party officials who were recruited to serve as plaintiffs in this case. See, e.g., D. 74 at 5, 8, 11; D. 77 at 10-11, 23, 28; D. 78 at 39-40. Five of these plaintiffs are African-Americans, including incumbent Democrat Representative Mallory, who is the Majority Floor Leader of the Ohio House of Representatives and President of BEDO. D. 47 at 8-9.

1991. D. 13. Appellants had not yet filed an answer in the case, and under Fed.R.Civ.P. 12(a), were not required to do so before November 21, 1991. On November 22, 1991, Judge Dowd conducted a status conference and advised counsel that evidence was to be submitted by affidavit or deposition. D. 28. The Court indicated that it would hear no live testimony.

Over Appellants' objection to the lack of opportunity to present live testimony, D. 95, the case was heard by the district court on December 3 and 17, 1991. D. 46, 118; J.A. 3, 4. Following opening arguments on December 3, 1991, each side was allowed only three hours on December 17, 1991, in which to present its case. D. 48 at 123.

Dr. Gary King, Professor of Government at Harvard University and Director of the Harvard Data Center, testified both in his deposition and, on December 17 1991, in court that he had performed a bivariate ecological regression analysis. J.A. 220, 245-46. From that analysis, he determined that a significant degree of racially polarized voting existed in Ohio's urban counties. J.A. 221-24, 246-47. Dr. King further testified that the plan adopted by the Board had a partisan bias of zero, *i.e.*, was biased in favor of neither political party, while the proposed plan submitted by Appellees Ferguson and Quilter was biased in favor of Democrats and the proposed plan submitted by the Ohio Republican Party was biased in favor of Republicans. J.A. 217-18, 240-44.[18]

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[18] In reaching this conclusion, Dr. King analyzed over 200 presidential, congressional, general assembly, statewide office, and local races by precinct. *Findings and Conclusions*, App. at 193a (Ohio Apportionment Board Feb. 18, 1992); D. 151, Exs. 92-93; J.A. 220-21, 248. Appellees' expert, Gordon Henderson, on the other hand, analyzed only eleven 1990 Ohio House races in districts currently served by minority incumbents. J.A. 143. Henderson presented no support for his regression analysis and provided no standard deviations. *Findings and Conclusions*, App. at 191a (Ohio Apportionment Board Feb. 18, 1991).

On January 31, 1992, the district court issued an Opinion and Order. A majority concluded that as a matter of federal law, Appellants were not permitted to create minority controlled state legislative districts without first "justifying" their creation under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, i.e., establishing that the state legislative districts had diluted minority voting strength in the past, and that the creation of minority controlled districts was "justified" under the "totality of the circumstances" test of *Thornburg v. Gingles*, 478 U.S. 30 (1986).[19] The district court, in essence, held that the burden of proof rested not on the plaintiffs attacking the new districts as diluting minority voting strength under § 2 of the Voting Rights Act, see *Thornburg v. Gingles*, *supra*, but rather on the apportioning officials to show that the prior districts did dilute minority voting strength:

> Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation [of the Voting Rights Act]. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

Quilter v. Voinovich, App. at 14a (N.D.Ohio Jan. 31, 1992). Judge Dowd dissented, finding that Plaintiffs

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[19] Although the district court suggested that the plan was invalid because Tilling had created minority controlled districts "wherever possible," see e.g., *Quilter v. Voinovich*, App. at 9a (N.D.Ohio Jan. 31, 1992); *Quilter v. Voinovich*, App. at 131a (N.D.Ohio March 19, 1992), the court does acknowledge that a totality-of-the-circumstances analysis was done. *Quilter v. Voinovich*, App. at 11a-14a (N.D.Ohio Jan. 31, 1992). The crux of the district court's decision was that the analysis performed *prior to redistricting* was largely informal and, in the district court's view, insufficient. *Id.* The district court majority made no reference to the extensive testimony of Dr. King.

failed to satisfy *their* burden of proof that the 1991 Ohio plan of apportionment diluted minority voting strength. On February 3, 1992, Judge Dowd issued "Appendix 2" to his dissenting opinion, an appendix consisting of detailed fact findings supporting his dissent. App. 47a.

Appellants, expressly reserving their argument that the district court's Opinion and Order of January 31, 1992, was contrary to law, reconvened the Apportionment Board for the purpose of receiving evidence, from both the Board's majority and its minority members, concerning the totality of the circumstances justifying the creation of minority controlled districts under the 1991 plan of apportionment. D. 147, Ex. B at 13. At the conclusion of the February 18, 1992, session of the Apportionment Board, the Board, by a three-to-two vote, adopted Findings and Conclusions stating that the evidence received "justified" the Board's creation of minority controlled state legislative districts. D. 147, Ex. C at 76-77; App. 160a.

The Apportionment Board further took the opportunity on remand to make a series of technical corrections to the plan as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). D. 147, Ex. C at 59; App. 258a-259a. Those technical corrections, which largely involved reuniting split political subdivisions, see D. 192, affected the minority populations in some of the districts. As set forth in the Board's Findings and Conclusions, the technical corrections resulted in a reduction from eight to five minority controlled house districts, i.e., districts with a minority voting age population over 50%, *an increase of only one minority controlled district from the 1981 plan of apportionment*. App. 260a-263a. The plan as amended was labeled as "Amendment D." App. 258a-259a.[20]

[20] The 1981 plan of apportionment contained house districts in Cuyahoga County with a black population of 94.67%, 90.05%, and 74.8% of total population; and in Hamilton County with a black

Dr. King testified at both the February 11 and 18 sessions of the Apportionment Board that legally significant racial bloc voting existed in Ohio. J.A. 254, 266. In his presentation to the Board on February 11, 1992, he included a statistical analysis done after his original court testimony showing the advantage of minority incumbent state legislators over their election opponents. J.A. 259-62. This analysis supported the relatively modest increase in minority population in several of these incumbents districts. J.A. 260. Dr. King also testified that the plan, as amended, *i.e.*, "Amendment D," retained its partisan bias of zero. J.A. 260-61.

On March 10, 1992, the district court, in a two and one-half page decision and again by a two-to-one vote, ruled that Appellants had failed to "justify" the creation of minority controlled districts, *i.e.*, four districts in Cuyahoga County and one district in Hamilton County, despite the fact that the amended plan contained only one minority controlled district more than the 1981 plan of apportionment. See *ante* pp. 17-18 & n.20; App. 260a-263a. In one sentence, and without explanation, the court also found a violation of the Fifteenth Amendment to the United States Constitution:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan

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population of 53.20% of total population. "Amendment C" contained districts in Cuyahoga County with a black voting age population ("VAP") of 63.42%, 65.13%, 61.41%, and 58.36% of total VAP; in Franklin County with a black VAP of 50.30%; in Hamilton County with a black VAP of 56.83% and 52.60%; and in Montgomery County with a black VAP of 50.70%. "Amendment D" contained districts in Cuyahoga County with a black VAP of 63.42%, 65.13%, 61.41%, and 58.36%; and in Hamilton County with a black VAP of 52.72%. A complete listing of the percentages of black population under the various plans, including the plan proposed by Appellees Ferguson and Quilter, which contained six minority controlled districts, appears at App. 177a-178a and 260a-263a.

> as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). Consequently, the court ruled that the 1991 plan of apportionment was unlawful and ordered that a special master be appointed to redraw Ohio's state legislative districts. The district court majority also enjoined the May 5, 1992 Ohio primary election. Judge Dowd again dissented.

On March 11, 1992, Appellants filed their Notice of Appeal to this Court in the district court, App. 149a, and moved the district court to stay its Order of March 10, 1992. The district court, in an order issued on March 19, 1992, denied the motion for a stay of its March 10, 1992 Order. App. 127a. In this order, the majority restated and elaborated upon the rationale of its earlier decisions. In addition, the court went on in Part V of its decision to find that the 1991 plan of apportionment was also violative of the Fourteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, App. at 146a (N.D. Ohio March 19, 1992) (*per curiam*). Accordingly, Appellants also noticed their appeal from the March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the district court. App. 156a. Appellants also noticed their appeal from the March 31, 1992 Order fixing September 8, 1992, as the primary date for members of the Ohio General Assembly. App. 325a.

On April 20, 1992, this Court stayed the March 10, 1992 and the March 31, 1992 orders of the district court. *Voinovich v. Quilter*, 112 S. Ct. 1663 (1992). Probable jurisdiction was noted on June 1, 1992. *Voinovich v. Ferguson*, 112 S. Ct. 2299 (1992). The primary election for members of the Ohio General Assembly was held on June 2, 1992. See *Quilter v. Voinovich*, J.A. 333 (N.D. Ohio May 5, 1992).[21]

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[21] The district court's May 5, 1992 opinion was issued in response to Appellees' attempts to further delay the primary election even

SUMMARY OF ARGUMENT

1. State legislative redistricting is primarily a state function, and federal courts must respect a state's policies and preferences regarding its own reapportionment. The district court's decision in this case shifts the burden of proof from plaintiffs alleging minority vote dilution to state apportioning officials by requiring state officials to conduct a totality of circumstances analysis, see *Thornburg v. Gingles*, 478 U.S. 30 (1986), prior to redistricting and, in effect, to find a Voting Rights Act violation prior to the creation of any minority controlled districts. This shifting of the burden of proof impermissibly encroaches upon the state's exercise of its legitimate discretion to avoid the dilution of minority voting strength.

Furthermore, under the district court's opinion, minorities are *per se* unlawfully "packed" into minority controlled legislative districts whenever it would be possible to elect a minority candidate with less than a majority of minority population. This aspect of the district court's opinion would itself require a state to *maximize* minority voting strength.

Finally, the district court's holding that race may not be considered by state officials in their efforts to avoid

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after the stay order issued by this Court on April 20, 1992. Following the issuance of that order, Appellees returned to the district court claiming that the primary election must be conducted under "Amendment C" rather than "Amendment D," *i.e.*, the 1991 plan of apportionment as technically amended, despite the fact that "Amendment C" was defective under the Ohio Constitution. D. 181. The district court agreed with Appellants that the primary election would be conducted under "Amendment D."

The anomaly of Appellees' position in this case is exposed by their attempt to require the primary election to be conducted under "Amendment C." On the one hand, they asserted that Appellants violated the Voting Rights Act by creating *too many* minority controlled districts, while on the other hand, they attempted to require the primary election to proceed under "Amendment C," which contained eight minority controlled districts, rather than "Amendment D," which contained only five minority controlled districts.

minority vote dilution is contrary to every decision construing § 2 of the Voting Rights Act.

2. Even if Appellants were required to "justify" their creation of minority controlled districts prior to their adoption, the overwhelming evidence before the Apportionment Board supported the creation of the five such districts contained in "Amendment D." Based upon this evidence, the Board concluded that the minorities in these districts were sufficiently large and geographically compact; that African-American voters in these districts are politically cohesive; that significant racial bloc voting existed in these districts; and that the other "totalities of the circumstances" factors supported their creation.

3. The district court's appointment of a special master to redraw Ohio's state legislative boundaries encroaches upon the discretion which a state must be afforded to redistrict its own legislature. The district court failed to give the Apportionment Board a reasonable opportunity to adopt a substitute plan prior to the appointment of the special master.

4. The district court erroneously concluded that the 1991 plan of apportionment violated the Fifteenth Amendment. There was a complete lack of evidence that the Board adopted the plan *because* of its adverse impact upon minorities, or that plaintiffs suffered any injury under the plan.

5. The district court erroneously found that the plan violated the Fourteenth Amendment. State legislative districts may have a total deviation in excess of 10% if that deviation is justified by adherence to a rational state policy. The district court failed to analyze the deviations in the case at bar under this test. The small deviation in excess of 10% in Ohio's legislative districts is supported by the Apportionment Board's rational policy of respecting county boundaries.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

In its opinion of January 31, 1992, the district court held that the Apportionment Board could not implement the state policy of attempting to avoid the dilution of minority voting strength in redistricting without first proving that the prior plan violated the Voting Rights Act. The Board's plan itself was held to violate § 2 of the Act because, in the district court's view, the Appellants had not properly conducted the analysis that this Court prescribed for use when a redistricting plan is challenged under that provision. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This determination was erroneous because, as noted by Judge Dowd, the *Thornburg* analysis is not a prerequisite to redistricting. *Quilter v. Voinovich*, App. at 31a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting).[22] See also *DeGrandy v. Wetherell*, —— F. Supp. ——, 1992 WL 145189, slip op. at *6 (N.D. Fla. May 29, 1992) ("*Gingles*, while helpful, is not dispositive of this case because this case does not involve a traditional section 2 challenge to an existing plan."); *Fonfara v. Reapportionment Comm'n*, 222 Conn. 166 (1992) (rejecting argument that state reapportionment commission was required to prove "applicability of the Voting Rights Act" prior to redistricting). The district court, in effect, relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the

[22] The legislative history of the 1982 amendments to the Voting Rights Act supports Judge Dowd's observation. Congress continually referred to the totality of the circumstances or "results tests" as a vehicle for *plaintiffs* alleging minority vote dilution to attack district boundaries, not as an analysis to be conducted by state officials as a prerequisite to their redistricting. See generally S.Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Admin. News 177.

Voting Rights Act and or that their redistricting plan does not presently violate § 2.[23]

This Court long ago firmly established "that 'reapportionment is primarily a matter for legislative consideration and determination . . . .' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment." *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)) (citations omitted). A federal court should respect the "policies and preferences" of a state regarding its own reapportionment, so long as those policies and preferences are not in violation of federal law. *White*, 412 U.S. at 795.

The district court in the case at bar, by shifting the burden of proof to state apportioning officials to "justify" their reapportionment in the first instance, completely disregarded this Court's well-established admonition that reapportionment is a *state* function. The district court's decision placed a significant burden upon state apportioning officials to prove that their plan fully complies with the federal Voting Rights Act, relieving an allegedly

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[23] In its March 19, 1992 Order, the district court may have attempted to back away from this position, *Quilter v. Voinovich*, App. at 130a-131a (N.D.Ohio March 19, 1992) (*per curiam*), but later in that same opinion, the court again held that apportioning officials must first conduct a totality of the circumstances analysis prior to any attempt to avoid minority vote dilution:

> If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. *Whether such a Board is competent in the first instance to make the necessary totalities evaluation required by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.*

App. at 140a (emphasis added) (citations omitted).

aggrieved plaintiff class—in this case a class purportedly consisting of Democrats and minorities, D. 49—from any burden to show that the plan, as drawn, results in dilution of its voting strength.

As evidenced by the district court's opinions of January 31, 1992, and March 19, 1992, the burden placed upon state apportioning officials by the district court majority is a heavy one, requiring a formal and exhaustive statistical analysis prior to any state legislative reapportionment. Neither § 2 itself nor its legislative history contains the slightest indication that Congress intended to place such an extraordinary and inappropriate burden upon state officials. The district court has, in effect, ruled that the Apportionment Board must function as a quasi-judicial body, a function not conferred upon the Board by the Ohio Constitution. See *ante* p. 23 & n.23. Given that there are no plaintiffs or defendants before the Apportionment Board, the district court's decision would require the Board to adjudicate hypothetical legal claims.

The district court has, in effect, subjected non-§ 5 states to a more rigorous procedure than that imposed on § 5 states, i.e., states in which "the inability of minorities to participate equally in electoral processes has already been proven by the legislative findings of Congress," *Quilter v. Voinovich*, App. at 136a (N.D.Ohio March 19, 1992) (*per curiam*), and whose reapportionments must be pre-cleared by the Justice Department. Surely, Congress would not have placed this burden upon non-§ 5 states without indicating that it was doing so.

The district court supports its decision to place this burden upon Appellants by referring to Appellants' actions as deliberately creating minority controlled districts "wherever possible." As noted above, this is a mischaracterization of the process followed in drafting the 1991 plan of apportionment. The position consistently taken by Appellants throughout the process of drafting the

plan has been that § 2 of the Voting Rights Act does not, *per se*, require or prohibit the creation of minority controlled districts. *Findings and Conclusions*, App. at 270a (Ohio Apportionment Board Feb. 18, 1992).

Indeed, had Appellants taken the view that the Voting Rights Act required the *maximization* of minority voting strength they would, as noted by Judge Dowd, have drawn districts with the lowest percentage of black population necessary to elect a black member of the Ohio House of Representatives. *Quilter v. Voinovich*, App. at 35a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). Under the district court opinion, minorities are *per se* unlawfully "packed" into a minority controlled legislative district whenever it would be possible to elect a minority candidate with less than a majority of minority population in that district. The district court ruled that minority voters in excess of that number were "wasted," and thus should be placed in another district where they may result in additional influence for the minority community. *Quilter v. Voinovich*, App. at 8a (N.D.Ohio, Jan. 31, 1992). Accordingly, it is the district court's decision, not the process of drafting the 1991 plan of apportionment, which would require the *maximization* of minority voting strength.

From the outset of the reapportionment process, which began nearly one year prior to the adoption of the plan in October, 1991, Tilling consulted with the Ohio NAACP and with other minority leaders throughout the state to achieve a consensus on the configuration of house and senate districts in Ohio's urban counties. *Findings and Conclusions*, App. at 269a-270a (Ohio Apportionment Board Feb. 18, 1992). In an effort to open up the reapportionment process, the Board, in the two months prior to the adoption of a plan, held an unprecedented series of public hearings throughout the state to receive public input on the drafting of the new plan. *Findings and Conclusions*, App. at 163a (Ohio Apportionment

Board Feb. 18, 1992). Indeed, as conveniently ignored by the majority of the district court, Tilling's and the NAACP's original proposed plans are virtually identical with respect to districts in Ohio's urban counties. The only changes in Tilling's plan, other than the technical corrections made October 3, 1991, and February 18, 1992, were in Cuyahoga County and were the result of consultations with the NAACP and other minority groups.

With this background in mind, it is not surprising that this case appears to have been commenced primarily to preserve the lopsided majority that incumbent white Democrats now hold in the Ohio House of Representatives. See *Appellees' Motion to Dismiss or Affirm* at 19-20 ("Tilling knew that black voters in Ohio voted 85-95% Democratic and that wherever blacks were 13% or more of the population, Democrats were inevitably elected."),[24] Floyd Johnson of the Ohio NAACP decried the Appellees' efforts to "use" black voters to bolster the incumbencies of white Democrats as "plantation politics" which could no longer be tolerated. D. 147, Ex. B at 62. See *DeGrandy v. Wetherell*, —— F.Supp. ——, 1992 WL 145189 (N.D. Fla. May 29, 1992).[25]

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[24] Appellees presented a claim of political gerrymandering to the district court, which did not find that Appellees had established such a claim.

[25] The district court in *DeGrandy, supra*, rejected a similar argument:

> Proponents of the plans which include influence districts argue that it is more desirable for African Americans to have influence in several districts rather than constituting a majority in only two districts.
>
> We believe the second approach, which fractures the African American community into influence districts, would merely continue the past dilution of minority voting strength. * * * The approach of fracturing the African American community in order to create influence districts does not further Congress's intent of completely remedying the prior dilution of minority voting strength and providing a meaningful opportunity to participate in the political process.

DeGrandy, slip op. at *9 (citations omitted).

The district court's decision of January 31, 1992, that race may not be considered in a state's efforts to avoid the dilution of minority voting strength during redistricting, is contrary to every decision relating to the Voting Rights Act. For example, in *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977), this Court held that redistricting officials satisfied their obligation under § 5, 42 U.S.C. § 1973c, "where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority," 430 U.S. at 159, and that "compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines." *Id.* The Court approved the use of racial criteria in drawing district lines under § 5 of the Voting Rights Act by noting that "the Constitution does not prevent a State subject to the Voting Rights Act from *deliberately creating or preserving black majorities in particular districts* in order to ensure that its reapportionment plan complies with § 5." 430 U.S. at 161 (emphasis added). The Court further noted that state officials need not confine their use of racial criteria to the elimination of past discriminatory reapportionment, 430 U.S. at 161, and that a state was permitted to consider racial criteria in an effort to comply with the Voting Rights Act. 430 U.S. at 167-68.

Similarly, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), the court concluded that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court or by a political entity in the first instance, does not violate the Constitution." 918 F.2d at 776.

In *Wilson v. Eu*, 1 Cal.4th 707, 4 Cal.Rptr.2d 379 (1992), the California Supreme Court adopted redistricting plans for the California Assembly, Senate and Congressional delegation after the state legislature's failure to enact plans in time for the 1992 elections. The court,

relying upon *United Jewish Organizations*, *supra*, and *Garza*, *supra*, adopted its special masters' report, which "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district." 4 Cal.Rptr.2d at 383. The California special masters' plan sought to avoid a successful § 2 challenge simply by avoiding the fragmenting of any large and compact minority population. 4 Cal. Rptr.2d at 397-99. The California Supreme Court's decision that apportioning officials may create minority controlled districts in order to avoid a successful Voting Rights Act challenge is consistent with this Court's holding in *United Jewish Organizations*, *supra*.

In *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), the United States District Court for the Northern District of Illinois concluded that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." 777 F.Supp. at 650-51 (citations omitted). Similarly, the United States District Court for the Western District of Texas, in refusing to issue a preliminary injunction against the state legislature's Congressional redistricting plan, approved of the use of racial criteria in drawing districts. *Terrazas v. Slagle*, 789 F.Supp. 828, App. at 302a (W.D.Tex. 1991), *aff'd*, 112 S.Ct. 3019 (1992).[26] See also *Jeffers v. Clinton*, 730 F.Supp. 196, 215 (E.D.Ark. 1989), *aff'd*, 111 S.Ct. 662 (1991); *DeGrandy v. Wethercell*, —— F.Supp. ——, 1992 WL 145189, slip op. at *8-9 (N.D.Fla. May 29, 1992); *Prosser v. Election Bd.*, —— F.Supp. ——, 1992 WL 124378, slip op. at *9 (W.D.Wisc. June 2, 1992); *In re Petition of Stephan*,

[26] The *Terrazas* Court found that the state legislature's plan for redistricting the state house and senate violated the Voting Rights Act by not creating enough Hispanic and African-American districts, and accordingly enjoined implementation of that plan.

—— P.2d ——, 1992 WL 165961, slip op. at *10-12 (Kan. July 10, 1992); *Cotlow v. Growe*, No. C8-91-985, App. at 287a, 291a (Minn. Redistricting Panel Nov. 21, 1991); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, —— A.2d ——, 1992 WL 100392, slip op. at *13 (Pa. Feb. 14, 1992), *cert. denied*, 112 S.Ct. 2998 (1992).

The district court, contrary to every court to consider the issue, has told the state that it cannot exercise its legitimate discretion to avoid minority vote dilution without first satisfying a federal court that, in doing so, it is remedying a preexisting violation of the Voting Rights Act. This serious intrusion on state authority should not be allowed to stand.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MINORITY CONTROLLED DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT.

In its Order of March 10, 1992, the district court compounded its error of January 31, 1992, by concluding, against the overwhelming weight of evidence, that Appellants had failed to "justify" their creation of minority controlled districts, under the totality of the circumstances test of *Thornburg v. Gingles*, *supra*. As Judge Dowd noted, the evidence "justifying" the creation of minority controlled districts was overwhelming. *Quilter v. Voinovich*, App. at 122a (N.D. Ohio March 10 1992) (Dowd, J., dissenting), yet the lower court majority ruled that Appellants had failed to satisfy their burden of proof. See *Quilter v. Voinovich*, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*) ("Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965.").

The lower court not only ruled that the Board failed to satisfy its *burden* of proof, but by according no deference to the Board's exhaustive findings, it held the

Board to an improperly stringent *standard* of proof. Even if this Court were to rule that a state must "justify" its creation of minority controlled districts prior to their adoption, it should nevertheless hold that the Board's findings and conclusions are entitled to deference and that the Board did indeed justify its creation of the five minority controlled districts at issue in this case. *See Kuvicier v. Daggett*, 462 U.S. 725, 759 (1983) (Stevens, J., concurring) ("[I]f neutral decisionmakers developed the plan on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced."). *See also Kansas ex rel. Stephan v. Graves*, —— F.Supp. ——, 1992 WL 152251, slip op. at *2 (D.Kan. June 24, 1992) ("[D]eference to a decision made by the state legislative and executive branches in [redistricting], which is so necessarily political, is an important linchpin of judicial review."); *In re Reapportionment of the Colorado Gen. Assembly*, 828 P.2d 185, 189-90, 192 (Colo. 1992) (state supreme court noted that it must accord a presumption of good faith and validity to plan adopted by the state reapportionment commission and its resolution of Voting Rights Act issues); *Fontana v. Reapportionment Comm'n*, 222 Conn. 166 (1992).

The district court was clear in its opinion of March 10, 1992, that the only purpose of its January 31, 1992, remand to the Apportionment Board was for the Board to "show justification under the totality of the circumstances test for the majority-minority districts or submit a revised plan." *Quilter v. Voinovich*, App. at 118a (N.D.Ohio March 10, 1992). Prior to remand, and therefore prior to the adoption of the technical amendments contained in "Amendment D," the Board had created only eight minority controlled districts. App. 260a-263a. During the course of hearings on remand, the Board received volumes of evidence and adopted exhaustive findings and conclusions

clearly establishing that both the eight minority controlled districts in "Amendment C" and or the five minority controlled districts in "Amendment D" were warranted under the totality of the circumstances test of *Thornburg v. Gingles, supra*.

In *Thornburg*, this Court set forth the analysis lower courts should use in evaluating *plaintiffs'* claims of minority vote dilution under § 2 of the Voting Rights Act. The Court noted that there are essentialy three preconditions to such a claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Thornburg, 478 U.S. at 50-51 (citations omitted). The Court went on to note that if plaintiffs establish these preconditions, a *court* should consider the other factors listed in the Senate Report accompanying the 1982 amendments to the Voting Rights Act. See S. Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177.[27]

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[27] Those factors include: the history of voting-related discrimination in the state; the extent to which the state has used voting practices or procedures which tend to enhance the opportunity for discrimination against minorities; the exclusion of members of the minority group from the candidate slating process; the extent to which minorities bear the effects of past discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; the extent to which members of the minority group have been elected to public

Analyzed within this framework, it is clear—even if the position of Judge Dowd and of the Appellants is rejected and the apportioning defendants do bear the burden of proof—that the creation of the five minority controlled districts declared invalid by the district court was "justified." Initially, it must be noted that contrary to the district court's opinion, the state need not support the creation of such districts by performing a formal analysis. *Hall v. Holder*, 955 F.2d 1563, 1570-71 (11th Cir. 1992), *petition for cert. filed*, 60 USLW 3881 (June 16, 1992). *See also Westlego Citizens for Better Gov't v. City of Westlego*, 946 F.2d 1109, 1118 n.12 (5th Cir. 1991) (statistical evidence of racial polarization is not necessary to prove cohesion of minority group). As discussed above, Tilling informally concluded prior to the adoption of "Amendment C" that, based upon his own extensive experience in Ohio politics, the creation of such districts was warranted under *Thornburg*. See *ante* at pp. 8-9. Nevertheless, the Board performed an exhaustive formal analysis following the district court's January 31 1992 remand, and concluded that the overwhelming evidence did indeed support the creation of the five minority districts contained in "Amendment D."

A. Size and Compactness of African-American Populations.

It is undisputed that Ohio's African-American population is concentrated in its eight urban counties. *Quilter v. Voinovich*, App. at 77a-78a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting). Indeed, as evidenced by the fact that "Amendment C" contained eight minority controlled districts (and, as originally proposed, contained nine), it is clear that more minority controlled districts, containing compact minority population, could have been created absent compliance with the Ohio Constitution.

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office; the responsiveness of elected officials to the particularized needs of the minority community; and the policy underlying the state's district lines. *Thornburg*, 478 U.S. at 44-45.

B. Cohesiveness of African-Americans and Racial Bloc Voting.

In *Thornburg*, this Court noted that the degree of racial bloc voting which is "legally significant" varies from district to district. 478 U.S. at 55-56. Generally, however, the political cohesiveness of a minority group, and thus racial bloc voting, may be established by showing "that a significant number of minority group members usually vote for the same candidates . . . . And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Thornburg*, 478 U.S. at 56. The Court also noted that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." 478 U.S. at 57. See also *Clark v. Edwards*, 725 F.Supp. 285 (M.D.La. 1988), *reaffirmed*, 777 F.Supp. 471 (1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992); *DeBaca v. County of San Diego*, —— F.Supp. ——, 1992 WL 114049, slip op. at *10 (S.D.Cal. May 11, 1992). This Court also endorsed the consideration of the benefits of running as an incumbent in determining whether racial bloc voting exists. *Thornburg*, 478 U.S. at 60. See also *Collins v. City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), *cert. denied*, 111 S.Ct. 340 (1990); *Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992).

In the case at bar, Dr. King, one of the foremost experts on racial bloc voting, extensively testified in his deposition, before the district court, and before the Apportionment Board, that racial bloc voting existed in all of the districts at issue in this case. J.A. 224, 247. He analyzed over two hundred elections by precinct from 1982 through 1990 in reaching this conclusion. J.A. 245-48. He conducted a bivariate ecological regression analysis, J.A. 220, 245, and confirmed the results of that

analysis by conducting a homogeneous precinct analysis and an analysis based upon an aggregated compound multinominal model. J.A. 222-24.

Dr. King's analysis confirmed that significant racial bloc voting existed in all Ohio House districts with significant minority population. Although this analysis did indeed show that African-American legislators were elected with some white crossover votes, the degree of racial bloc voting was a very significant figure of 44.1, i.e., the percentage of blacks voting for black candidates in the relevant districts exceeded the percentage of whites voting for black candidates in those districts by 44.1. J.A. 221, 251-52.

In its *Findings and Conclusions*, the Apportionment Board rejected the testimony of Appellees' expert, Gordon Henderson. Unlike Dr. King, who has extensively published scholarly articles on racial bloc voting and who has received numerous grants and awards, App. 192a-193a, Henderson has never written anywhere on the topics of apportionment, redistricting, gerrymandering, racial bloc voting or minority voting rights. App. 193a. Contrary to this Court's observation that several elections must be analyzed to determine whether there exists a probative pattern of racial bloc voting, *Thornburg*, 478 U.S. at 57, Henderson analyzed only election results for the 1990 elections in the eleven districts currently served by incumbent black legislators, and the results in one district, in Cuyahoga County, in the 1988 Democratic presidential primary. J.A. 143, 172. Henderson reviewed no state legislative primary election data to determine whether the Democratic candidate receiving the majority of African-American votes in the general election was the minority community's preferred candidate. J.A. 172. Dr. King testified that Henderson's analysis was not statistically reasonable. J.A. 247-49. Accordingly, the Apportionment Board concluded that Henderson's statistical evidence testimony was not credible with regard to the issues before the Board. *Findings and Conclusions*, App. at 206a (Ohio Apportionment Bd. Feb. 18, 1992).

Confident that a pattern of bloc voting had been shown, the Board considered the other totality of circumstances factors.

C. History of Official Discrimination.

The Apportionment Board noted that there had been a history of official discrimination against minorities in Ohio. App. 195a-205a. Most recently, the 1981 apportionment plan was ruled to have violated § 2 of the Voting Rights Act and the Fifteenth Amendment with respect to the division of the African-American community in Mahoning County. *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991). Until 1991, the reapportionment process had not been open to participation by minorities. D. 70 at 95. In addition, former Governor Richard F. Celeste and former Secretary of State Sherrod Brown conceded in litigation that the at-large election of municipal court judges in Hamilton County violated § 2 of the Voting Rights Act. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991).

The Board also cited to 25 other reported judicial decisions involving instances in which the state or its political subdivisions had been found guilty of discrimination against minorities in maintaining segregated school systems, in the hiring and promotion of employees, in the award of state contracts, in public housing and zoning, and in maintaining segregated public facilities. App. 196a-200a. See *Jordan v. Winter*, 604 F.Supp. 807, 811-12 (N.D.Miss. 1984) (*per curiam*) (relying upon reported judicial decisions to establish history of past discrimination), *aff'd*, 469 U.S. 1002 (1984). Dana Mattison, the executive Director of BEDO, and Floyd Johnson testified concerning other "unreported" instances of official discrimination. App. at 202a-204a.

D. Barriers to Effective Minority Participation.

Mattison and Johnson both testified as to the barriers to effective minority participation in the democratic process in Ohio. App. 206a-210a. Such barriers include the candidate screening process within the Democratic party

and the lack of majority financial support for minority candidates.

E. Other Factors.

The Board also concluded that minorities in Ohio presently suffer the effects of past discrimination in employment, education, income, and housing, App. 210a-215a;[28] that past political campaigns have been characterized by overt or subtle racial appeals, App. 215a-218a;[29] and that minorities have not been particularly successful when running for public office, App. 219a-222a.[30]

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[28] Unemployment rates for blacks have consistently been from two to four times as high as those for whites in Ohio's urban counties since at least 1979. App. 211a-212a. Black mean household income has been significantly less than that for whites. App. 213a. Over four times the percentage of blacks live below the poverty level than do whites. App. 213a. A significantly higher percentage of blacks than whites have not completed high school and have no college education. App. 214a. The value of whites' housing is substantially greater than that of blacks' housing in all of Ohio's urban counties. Blacks are also substantially disadvantaged in health care. *Final Report*, Governor's Task Force on Black and Minority Health (1987), D. 153, Ex. 107; *Ohio's African-American Males: A Call to Action*, Report of Governor's Commission on Socially Disadvantaged Black Males (1990), D. 153, Ex. 106.

[29] Tilling noted that racial appeals played a significant role in numerous elections pitting black and white candidates against each other, including Columbus and Cleveland mayoral races, a Columbus City Attorney race, an Ohio Secretary of State race, and the Cuyahoga County Clerk of Courts race. Mattison and Johnson both testified that race is an issue in all elections where one of the candidates is black.

[30] Despite several attempts, no minority person has ever been elected to statewide office in Ohio. App. 219a. With the exception of Cuyahoga County, minorities have had little success in county and city-wide elections in Ohio's urban counties. For example, only one black has been elected county commissioner in an urban county other than Cuyahoga County since 1984. App. 220a-226a. Although there are eleven incumbent minority Ohio House members, several of those members initially received the advantage of running as an incumbent by being appointed to fill vacant positions. App. 221a. Black voter turnout in these legislators' districts ranged from 12.63% to 36.33% in 1990. App. 223a.

From the foregoing, it is clear that the Apportionment Board's creation of five minority-controlled districts in the 1991 plan of apportionment was justified by the substantial weight of the evidence. Accordingly, the district court's conclusion to the contrary cannot withstand scrutiny.[31]

III. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN.

In its decision of March 10, 1992, the district court appointed a special master to draw a new plan of apportionment for the members of the Ohio General Assembly. That appointment exceeds the clear limitations imposed by this Court on a district court's remedial powers in reapportionment cases:

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. *When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.* The new legislative plan, if forthcoming, will then be the governing law unless it too, is challenged and found to violate the Constitution. "[A] state's freedom of

[31] In a feeble attempt to support its finding of a § 2 violation, the district court ruled that the addition of minority population to a district represented by a minority incumbent who receives white crossover votes constituted "packing." App. 141a. The court apparently suggests that reapportionment should be based upon the incumbencies of minority legislators, an idea rejected by Tilling, D. 102 at 47-48; D. 123 at 90, 176-78, and by several courts. *Prosser*, 1992 WL 124378, slip op. at 11 ("The goal of the Voting Rights Act is to enhance the electoral power of minority voters, rather than to maximize the electoral prospects of minority incumbents."); *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983).

> choice to devise substitutes for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978) (citation omitted) (emphasis added). See also *Burns v. Richardson*, 384 U.S. 73, 85 (1966).

Although the district court suggested that the Apportionment Board failed *twice* to adopt a valid plan, it must be emphasized that the court, in its Opinion and Order of January 31, 1992, did *not* invalidate the 1991 plan of apportionment. Rather, the district court found insufficient evidence to support the creation of minority controlled districts in the plan. Accordingly, the Board was ordered to reconsider the plan to show "justification" for such districts. The Board did exactly that when it reconvened to receive evidence regarding the totality of the circumstances, and when it issued findings and conclusions setting forth the basis for the creation of minority controlled districts.[32]

The district court's determination on March 10, 1992—that the creation of minority controlled districts was not justified, *i.e.*, that the plan is invalid—was thus the first and only such declaration. Contrary to the clear dictates of this Court, the district court did not afford the Board a reasonable opportunity to adopt a substitute plan, which plan would "be the governing law." *Wise*, 437 U.S. at 540. In not affording the Board such an opportunity, as well as in arbitrarily fixing September 8, 1992, as the date of the primary election for members of the Ohio General Assembly, the district court encroached upon the autonomy of the state to reapportion its own state legislature—an autonomy that, as noted above, has long been recognized by this Court.[33] Accordingly, this Court should

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[32] Indeed, Appellee Ferguson agreed that the district court's January 31, 1992 opinion did not invalidate the 1991 plan of apportionment. D. 147, Ex. B at 92.

[33] At its sessions following the district court's remand of January 31, 1992, the Board considered two alternatives ("Amendment E"

reverse the district court's appointment of the special master to redraw Ohio's legislative boundaries.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT.

As previously noted, the district court found in one sentence that the 1991 plan of apportionment violated the Fifteenth Amendment:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). The district court did not discuss the element of discriminatory motive that this Court has clearly held must be proved in order to establish a Fifteenth Amendment claim. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").[34] In its decision of March 10,

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and "Amendment F"). "Amendment E" reduced the relative minority population to approximately the same levels as existed under the 1981 apportionment, while "Amendment F" reduced the relative minority population in Cuyahoga County districts by creating five, rather than four, minority controlled districts within that county. The Board advised the district court that the 1991 plan as corrected, *i.e.*, "Amendment D," best satisfied the Board's totality of circumstances analysis, but that "Amendments E and F" were acceptable alternatives the court could consider. The district court considered neither of these alternatives.

[34] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court concluded that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 446 U.S. at 71 n.17 (citation omitted). See also *Flanagan v. Gillmor*, 561 F. Supp.

1992, the district court pointed to no evidence that Appellants' creation of minority controlled districts was done with any conceivable discriminatory motive.[35]

The district court attempted to bolster its finding of a Fifteenth Amendment violation in its opinion of March 19, 1992, by asserting that alleged political motivation constituted invidious racial discrimination:

> Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim.

Quilter v. Voinovich, App. at 142a-143a (N.D.Ohio March 19, 1992) (*per curiam*) (footnotes and citations omitted).[36] In its footnotes, the court pointed only to evidence (1) that Tilling drew the plan in conformity with his understanding of the requirements of the Voting Rights Act, and that in doing so he split political subdivisions in

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36, 45 (S.D.Ohio 1982) (three-judge court), *aff'd*, 467 U.S. 1223 (1984).

[35] To establish a Fifteenth Amendment claim of intentional racial discrimination, a plaintiff must prove both discriminatory motive and injury. *Garza v. County of Los Angeles*, 918 F.2d at 771 (citing *White v. Regester*, 412 U.S. 755 (1973)). The record in this case is completely devoid of any evidence of injury to plaintiffs under the 1991 plan of apportionment.

[36] The district court attempted to apply the sound holding of *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), but overlooked two key points of that decision. The *Garza* court held that in order for political motivation to be intentional discrimination, (1) the instrument for executing that political motivation must have a dilutive effect on minority voting strength, and (2) the dilutive effect must be known to the political body making the decision. There is no proof of either of these elements in the case at bar.

apparent violation of the Ohio Constitution, and (2) that Tilling had possession of documents purporting to show how the Republicans might politically gerrymander the state's new districts. App. at 142a-143a n.8 & 9.

This "evidence" simply does not support the district court's finding of a Fifteenth Amendment violation. First, the district court ignores the fact that technical corrections were made to the plan on February 18, 1992, reuniting split political subdivisions as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See D. 192.

Second, Tilling's *mere possession* of documents suggesting that the Republicans might be able to politically gerrymander Ohio's new house and senate districts in no way supports the district court's finding that he did so. The district court referred to the documents entitled "Republican Opportunities" and "Let's Pretend," which were drafted by David Horn, a Democrat farmer from Athens County, Ohio. J.A. 99-100; D. 113 at 86, 90-91.[37] Tilling retained these documents only to compare them to his plan to show that it was politically fair. J.A. 33-34.[38] Both Horn and Tilling testified that they never spoke to each other during the reapportionment process, J.A. 35-36; D. 113 at 144, and Tilling's uncontroverted testimony was that he never used either document in preparing his plan. D. 103 at 77-78. Moreover, Dr. King testified that based upon his analysis, the Board's plan of apportionment had a partisan bias of zero, J.A. 217, 240-41, belying any assertion that it was a "Republican gerrymander." Indeed, the district court ignored, and

[37] Tilling knew Horn from working with him in a failed bipartisan effort to reform Ohio's constitutional reapportionment process by removing most of the discretion from the process and replacing it with a mathematical formula. J.A. 33; D. 103 at 77-78.

[38] This comparison became unnecessary when the Ohio Republican Party and the Democratic members of the Apportionment Board submitted plans biased in favor of their respective parties.

therefore presumably rejected, Appellees' political gerrymandering claim under the Fourteenth Amendment.

And, finally, none of the evidence referenced by the district court in any way suggests that Tilling drew the minority controlled districts "'because of' . . . [their] adverse effects upon an identifiable group" as required by this Court's decision in *City of Mobile v. Bolden*, 446 U.S. at 71 n.17. Tilling consulted with the Ohio NAACP, which fully endorsed the minority controlled districts under the 1991 plan of apportionment. *Quilter v. Voinovich*, App. at 28a (N.D.Ohio Jan. 31, 1992) (Dowd, J., dissenting). Indeed, as conveniently ignored by the majority below, the Ohio NAACP's proposed plan of apportionment for Ohio's urban counties *was substantially incorporated into the plan drafted by Appellants*. The only changes to the NAACP plan as adopted, other than the technical corrections made on February 18, 1992, were in Cuyahoga County following consultations between Appellants, the Ohio NAACP, the Black Elected Democrats of Ohio ("BEDO"), and the Black Elected Democrats of Cleveland, Ohio ("BEDCO"). All of these groups endorsed the final districts in Cuyahoga County. It is inconceivable, therefore, that Appellants adopted the 1991 plan of apportionment because of its adverse effects upon the minority community in Ohio. See *Flanagan v. Gillmor*, 561 F.Supp. at 46 ("The conclusion that no impermissible racial motivation accounted for district line drawing by the drafters of [Ohio's 1981 Congressional redistricting plan] is bolstered by the bipartisan efforts to avoid diluting black voting power in the redistricting of the northeastern Ohio area . . . .").

In light of this factual background, as well as the district court's failure to make adequate findings of discriminatory motive or injury, it is evident that the court simply eliminated discriminatory motive as an element of a Fifteenth Amendment claim. Accordingly, this Court should reverse the district court's finding of a Fifteenth Amendment violation.

V. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT.

In its decision of March 19, 1992, denying Appellants' motion for a stay, the district court, for the first time in this proceeding, also found that the 1991 plan of apportionment violated the Fourteenth Amendment with respect to three house districts created pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution. Those sections, expressing a state constitutional policy of designating single counties as whole house districts where reasonably possible, permit the Apportionment Board to designate a county as a house district when its population is within 10% of the ideal population. The Board created three such House districts: Ashtabula County (HD 5), Fairfield County (HD 6), and Wayne County (HD 7). *Quilter v. Voinovich*, App. at 22a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). The lower court also found that one senate district (Senate District 32), which was approximately 94% of the ideal district ratio, violated the Fourteenth Amendment.[39]

The lower court's finding of a Fourteenth Amendment violation cannot be sustained. The district court, contrary to this Court's well-established analysis for such Fourteenth Amendment violations, found a violation solely because the districts were not within plus or minus 5% of the ideal population. The court said:

> Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized

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[39] Ohio Supreme Court Douglas has suggested that this claim is barred by the doctrine of res judicata. *Voinovich v. Ferguson*, 63 Ohio St.3d at 209-10 (Douglas, J., concurring). The redistricting case before the Ohio Supreme Court, *Voinovich v. Ferguson*, *supra* specifically concerned whether the senate district was within Ohio Constitutional population requirements. The Ohio Supreme Court held that it was. Appellees Ferguson and Quilter, although parties to that proceeding, chose not to assert their Fourteenth Amendment claim, which claim was a compulsory counterclaim, and Justice Douglas stated that, in his view, the claim is therefore barred.

> that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county boundaries, must give way to the equal population standard if there is an unavoidable conflict. Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 148a (N.D.Ohio March 19, 1992) (*per curiam*) (citations omitted).

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment requires that seats in both houses of a bicameral state legislature be apportioned substantially on a population basis. See also *Davis v. Mann*, 377 U.S. 678, 690 (1964). But in that same Term, the Court said:

> [I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman v. Sincock, 377 U.S. 695, 710 (1964). In this regard, the Court has noted "that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). See also *Reynolds*, 377 U.S. at 578.

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Our decisions

> have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population however, creates a prima facie case of discrimination and therefore must be justified by the State. The ultimate inquiry, therefore, is whether the legislature's plan "may reasonably be said to advance [a] rational state policy" and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (citations omitted). See also *Mahan v. Howell*, 410 U.S. 315 (1973) (concluding that Virginia apportionment plan, with 16.4% total deviation, was justified by the State's established policy of maintaining the integrity of political subdivision boundaries and, therefore, was constitutional).

The district court in the case at bar failed to perform the analysis required by this Court in *Brown* and *Mahan*. Rather, the Court simply invalidated four districts, three House and one Senate, merely because they exceeded the plus or minus five percent range of Article XI, §§ 3 and 4. App. 280a and 281a.[40] The Court totally ignored the express state constitutional policy of respecting county

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[40] In the plan of apportionment as amended on February 18, 1992, i.e., "Amendment D," the largest house district, House District 20 (Cuyahoga County), has a population of 114,943, or 104.91% of the "ideal population" of 109,567, i.e., one house ratio. The smallest house district, House District 5 (Ashtabula County), has a population of 99,281, or 91.10% of the ideal, for a maximum deviation of 13.81%, i.e., 104.91% minus 91.10%. See App. 99a-103a, D. 153, Ex. 116.

The largest senate district, Senate District 1 (HD 82, HD 83 and HD 86), has a population of 343,582, or 104.53% of the ideal population of 328,700, i.e., one senate ratio. The smallest senate district, Senate District 32 (HD 66, HD 67, and HD 68), has a population of 308,942, or 93.99% of the ideal, for a maximum deviation of 10.54%, i.e., 104.53% minus 93.99%. *Id.*

boundaries by creating single county house districts where reasonably possible. See Ohio Const., Article XI, §§ 9 and 10(B); App. 283a. All three house districts invalidated by the district court were created under the authority granted by the Ohio Constitution in these sections, and pursuant to the Apportionment Board majority's express instruction to Tilling. J.A. 272-75.

Furthermore, the senate district held violative of the Fourteenth Amendment was only slightly in excess of the 5% deviation from the ideal. The configuration of that district resulted from the mandate of other state constitutional provisions which prevented the addition of population from any of the adjoining counties—an addition that would have resulted in disregarding other county boundaries. See *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). The Ohio Supreme Court declined to invalidate that senate district by adding population because to do so would have been ordering the Apportionment Board "to correct one constitutional violation by committing another." 63 Ohio St.3d at 200.

From the foregoing, it is clear that the relatively minor total deivations over 10%, 3.81% for the House and .54% for the Senate, are justified by Ohio's express constitutional policy of respecting county boundaries, a justification long acknowledged by this Court to permit deviations slightly in excess of 10%. These deviations are well within the 16.4% deviation approved by this Court in *Mahan*, *supra*, and the district court's finding of a Fourteenth Amendment violation, without performing any of the required analyses, should therefore be reversed.

CONCLUSION

For the reasons stated, Appellants respectfully request that this Court reverse the March 10, 1992, March 19, 1992, and the March 31, 1992 judgments of the district court, and remand the case to that court with instructions to enter judgment in favor of the Defendants-Appellants.

DATED: July 31, 1992

Respectfully submitted,

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APPENDIX

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TABLE OF DOCKET AND EXHIBIT NUMBERS

D. 1 Complaint (Nov. 1, 1991)
D. 7 Order (assigning panel) (Nov. 7, 1991)
D. 13 Order (scheduling trial) (Nov. 14, 1991)
D. 16 Intervenors' Complaint (Nov. 8, 1991)
D. 28 Transcript of Telephone Conference (Nov. 22, 1991)
D. 46 Minutes of Proceedings (Dec. 3, 1991)
D. 47 Amended Complaint (Dec. 5, 1991)
D. 48 Transcript of Proceedings (Dec. 3, 1991)
D. 70 Deposition of Dana Mattison (Nov. 26, 1991)
D. 73 Deposition of Floyd Johnson (Nov. 27, 1991)
D. 74 Deposition of Sam Barone (Nov. 26, 1991)
D. 75 Deposition of Stanley J. Aronoff (Nov. 27, 1992)
D. 77 Deposition of Gen Achtermann (Nov. 26, 1991)
D. 78 Deposition of Charles Walker (Nov. 29, 1991)
D. 95 Defendants' Objection to Opportunity to Present Live Testimony (Dec. 12, 1991)
D. 102 Deposition of James R. Tilling (Nov. 20, 1991)
D. 103 Deposition of James R. Tilling (Nov. 22, 1991)
D. 104 Deposition of James R. Tilling (Nov. 25, 1991)
D. 110 Deposition of Robert A. Taft (Dec. 9, 1991)
D. 113 Deposition of David Horn (Dec. 10, 1991)
D. 118 Minutes of Proceedings (Dec. 17, 1991)
D. 123 Deposition of James R. Tilling (Dec. 14, 1991)
D. 147 Notice of Filing Record (filed Feb. 19, 1992)
Ex. B Apportionment Board Hearing Transcript (Feb. 11, 1992)
Ex. C. Apportionment Board Hearing Transcript (Feb. 18, 1992)
D. 151 Defendants' Exhibits, Volume IV (submitted at Apportionment Board Hearings of Feb. 11 and 18, 1992) (filed Feb. 19, 1992)
Ex. 92 Explanatory Listing of Items in Regression Analysis
Ex. 93 Bivariate Regression Analysis—Racial Bloc Voting
D. 153 Defendants' Exhibits, Volume VI (submitted at Apportionment Board Hearings of Feb. 11, and 18, 1992) (filed Feb. 19, 1992)

Ex. 106 *Ohio's African-American Males: A Call to Action*, Report of Governor's Commission on Socially Disadvantaged Black Males (1990)

Ex. 107 *Final Report*, Governor's Task Force on Black and Minority Health (1987)

Ex. 116 Amendment "D" to Plan of Apportionment for the Ohio House of Representatives and the Ohio Senate

D. 154 Joint Trial Exhibits (filed Feb. 19, 1992)

Ex. 1 Toledo Apportionment Board Public Hearing Transcript (August 26, 1991)

Ex. 2 Columbus Apportionment Board Public Hearing Transcript (Aug. 27, 1991)

Ex. 3 Cleveland Apportionment Board Public Hearing Transcript (Aug. 28, 1991)

Ex. 4 Mansfield Apportionment Board Public Hearing Transcript (Aug. 28, 1991)

Ex. 5 Dayton Apportionment Board Public Hearing Transcript (Aug. 29, 1991)

Ex. 6 Cincinnati Apportionment Board Public Hearing Transcript

Ex. 7 Athens Apportionment Board Public Hearing Transcript (Sept. 3, 1991)

Ex. 8 Cambridge Apportionment Board Public Hearing Transcript (Sept. 3, 1991)

Ex. 9 Canton Apportionment Board Public Hearing Transcript (Sept. 4, 1991)

Ex. 10 Youngstown Apportionment Board Public Hearing Transcript

Ex. 11 Chardon Apportionment Board Public Hearing Transcript (Sept. 5, 1991)

Ex. 12 Strongsville Apportionment Board Public Hearing Transcript (Sept. 5, 1991)

Ex. 13 Columbus Apportionment Board Public Hearing Transcript (Sept. 7, 1991)

Ex. 14 Akron Apportionment Board Public Hearing Transcript (Sept. 12, 1991)

Ex. 15 Apportionment Board Hearing Transcript (Sept. 30, 1991)

Ex. 16 Apportionment Board Hearing Transcript (Oct. 1, 1991)

Ex. 17 Apportionment Board Hearing Transcript (Oct. 3, 1991)

D. 181 Plaintiffs' Motion for Status Conference (April 22, 1992)

D. 192 Technical Amendments to Ohio 1991 Plan of Apportionment (filed May 5, 1992)